

DECISION



Japkel PLM 20
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

19066

FILE: B-197082

DATE: August 7, 1981

MATTER OF:

U. S. Financial Services, Inc.

DIGEST:

1. Noncompetitive renewal of lease of automatic data processing equipment was improper where agency knew competition was feasible.
2. Order for disk drives placed against Federal Supply Schedule contract based on urgency was not justified where record indicates agency's needs in fact could have been timely met by firms which responded to notice of requirement published in Commerce Business Daily.
3. Allegation that additional disk drives were improperly ordered under requirements contract, because contract does not apply in "upgrading situation," is denied since procurement was not to upgrade existing equipment but for acquisition of additional drives.
4. Allegation merely listing contract clauses said to place disk drive procurement outside scope of requirements contract is dismissed since protester does not allege facts indicating why exceptions are believed to apply.

U. S. Financial Services, Inc. (USFS) has filed a protest regarding three procurement actions taken by the Federal Bureau of Investigation (FBI) to maintain and enhance the automatic data processing (ADP) capability of its Data Center. These actions include:

[Protest Alleging Improper Procurement Actions]

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- 1) the extension of leases of equipment (160 disk drives) obtained previously from Itel under General Services Administration (GSA) ADP requirements contract GS-00C-50022;
- 2) the issuance to Itel Corporation of purchase order FBI-79402 for 16 single density dual port disk drives under an interim extension of GSA Federal Supply Schedule (FSS) Contract GSC-00C-01575 with Itel; the interim extension was executed after the expiration of GSA ADP requirements contract GS-00C-50022 with Itel and before award of a new GSA mandatory Government-wide indefinite quantity contract to Memorex Corporation, ADP Schedule contract GS-00C-50376; and
- 3) the issuance of a purchase order to Memorex Corporation under GSA ADP Schedule Contract GS-00C-50376 for 8 single and 48 double density drives.

According to USFS, the FBI improperly placed these orders notwithstanding that it knew that comparable equipment could be obtained from other firms, including USFS, at significantly lower cost.

We find the protest to have merit in part.

- I -

Initially, we point out that all ADP equipment acquisitions require GSA procurement authority. Federal Procurement Regulations (FPR) Temporary Regulation (Temp. Reg.) 46, 41 C.F.R. Appendix to Chapter 1 (1980), contains a blanket delegation of authority for certain purchases, including orders against ADP schedule contracts, subject to listed limitations.* GSA schedule

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Temp. Reg. 46 has been revised by 46 Fed. Reg. 1196-1213 (1981). Since the procurement was conducted prior to the revision, we will refer in this decision only to the regulatory provisions that were applicable at the time.

contracts for ADP equipment include FSS contracts, which generally cover a limited number of general-purpose ADP items, as well as Automated Data and Telecommunications Service (ADTS)/ADP schedule contracts.

As indicated, the first part of USFS's protest focuses on the FBI's noncompetitive renewal of leases on 160 IteI-furnished drives. These drives were installed under the once-mandatory GSA/IteI requirements contract (GS-00C-50022). Since by September of 1978, GSA believed award of a follow-on mandatory contract was imminent, it renewed at that time only the portion of the original contract which provided for continued lease, purchase, and maintenance of installed equipment. GSA advised agencies, however, that the contract as extended was not a mandatory one (evidently because competition did not precede the extension). In 1979, IteI and GSA agreed to extend the contract until September 30, 1980. Noting that the IteI contract had been extended with respect to installed equipment, the FBI renewed the leases, citing Temp. Reg. 46 as authorizing the renewal. According to USFS, however, the FBI could have properly placed the order under the extended contract only if better terms were not obtained through competition.

The provision in Temp. Reg. 46 which the FBI says it relied on is FPR § 1-4.1107-6(b)(3), which states:

"[ADTS/] ADP schedule contracts may be used for the continued lease or rental of installed equipment and software except that the continued lease of an installed central processing unit (CPU) or an ADP system that includes a CPU is subject to the following:

"(i) Requirements shall be synopsisized in accordance with paragraph (c) of this § 1-4.1107-6, and

"(ii) A specific delegation of procurement authority pursuant to § 1-4.1104 is obtained before issuing the renewal order where the schedule purchase price exceeds \$300,000 when the equipment is available from a source other than the schedule contract."

In the FBI's view, it was free to renew its leases with Itel because it was not renewing a CPU lease or a lease of a system as a whole which contained a CPU. As a result, it did not synopsise its requirement in the Commerce Business Daily (CBD).

However, FPR § 1-4.1107-6(b)(3) should not have been relied on. By its terms, it applies only to ADTS/ADP schedule contracts. We are informally advised by GSA that the extended Itel contract was not an ADTS/ADP schedule contract, but was simply a requirements contract for ADP equipment. GSA's regulations treat such requirements contracts separately from GSA schedule contracts (either FSS or ADTS/ADP). See FPR § 1-4.1103-1(b). Accordingly, the FBI's reliance on FPR § 1-4.1107-6(b)(3), applicable to ADTS/ADP schedule contracts, to renew the subject leases under a requirements contract, was misplaced.

Since, as stated above, the extended contract was not mandatory, the effect of the FBI's error was tantamount to a sole-source agreement with Itel. Under FPR § 1-3.210 (1964 ed.) a sole-source procurement is only proper where it is determined that it is impracticable to obtain competition. See discussion on pp. 5-6, *infra*. That determination could have been made based on a market survey or by synopsis in the CBD such as was done regarding the 16 drives discussed in part II below. It is clear from the record that the FBI did not determine that competition was impracticable with respect to the Itel lease because in contracting with Itel it was relying on the authority in FPR 1-4.1107-6(b)(3). Since we have found that FPR § 1-4.1107-6(b)(3) did not apply, the noncompetitive award to Itel was improper.

- II -

USFS' second complaint is that the FBI improperly ordered 16 new drives from Itel. As indicated, the 1978 extension of the original Itel contract (GS-00C-50022) was limited to installed equipment. Also in 1978, Itel received a separate FSS Group 70 contract (GS-00C-01575), under which orders for new equipment might be placed. The FSS contract, in turn, was extended by agreement between Itel and GSA when GSA was unable to complete the execution of a new Itel FSS contract by September 30, 1979. The record shows that the FBI announced its 16 drive requirement in the CBD and reviewed the responses

received (including one from USFS). However, it placed orders for the drives under the IteI FSS contract notwithstanding that at least two of the offers received were less costly than award to IteI. The FBI took this action because the drives allegedly were urgently needed, and the 60 to 90 days the FBI estimated would be needed to conduct a competitive procurement precluded it from timely meeting its needs from any other source. USFS argues that since two of the offers received were priced below IteI's, including its own offer to furnish identical equipment, the FBI's selection of IteI was unreasonable.

The FBI recognizes that because the drives were FSS items, its authority to acquire these items was limited by the requirements of FPR § 1-4.1107-6(a)(1), which states that:

"For each acquisition of ADPE from this source, the requirement shall be synopsized in accordance with paragraph (c) of this § 1-4-1107-6 and the procurement file documented with the results of the synopsis action * * *. If [an] affirmative response is received (other than from sources available under the FSS schedule contract program) and the FSS schedule is used, the procurement file shall be documented with evidence that use of the FSS schedule contract, including the method of acquisition; e.g., lease or purchase, is the lowest overall cost alternative available to the agency, price and other factors considered. As a minimum, the other factors to be considered shall be the continued availability of maintenance services and spare parts for the ADPE item."

As in the case of an ADTS/ADP schedule contract discussed above, compliance with the requirements of FPR § 1-4.1107-6(a) when applicable is a means of satisfying the general requirement for a delegation of procurement authority in these procurements. FPR § 1-4.1103-1(c)(4).

We have recognized the propriety of sole source awards under FPR § 1-3.210 where the minimum needs of the Government can be satisfied only by items or

services which are unique; where time is of the essence and only one known source can meet the Government's needs within the required time frames; where data is unavailable for competitive procurement; or where only a single source can provide an item which must be compatible and interchangeable with existing equipment. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

While the record in this instance indicates that the FBI had an urgent need for disk drives, competition appears to have been possible. The FBI was aware of a GSA memorandum entitled "Acquisition of Word Processing under FSC [FSS Group 70]" which includes a general scenario for ADP purchases against non-mandatory GSA schedule contracts under Temp. Reg. 46. Among other things, the GSA memorandum addresses the means which a contracting officer may consider to fill an urgent need if a synopsis produces responses from potential suppliers whose products are not listed on the FSS. For example, it indicates that an agency may issue:

"an RFQ [request for quotations] requesting the vendor [submitting a price below that for the schedule item] to respond with a firm price and delivery quotation and agreement * * * to execute a contract substantially similar to the schedule contract [identified in the CBD notice]. At the same time a similar solicitation is sent to the schedule vendor for his consideration of submission of a proposal to supply the item off-schedule [at a lower price]."

In a similar vein, we have recently stated that even faced with urgency an agency must take all reasonable steps to obtain competition whenever competition would be feasible. In Las Vegas Communications, Inc. -- Reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323, we pointed out that:

"Where time constraints prevent the preparation of definitive specifications, designs and drawings or the conduct

of a regular competition, urgency may justify an expedited negotiated procurement with as complete a statement of requirements as practical submitted to each competitor, shortened response times, telegraphic or oral offers and such other shortcuts as may be reasonably necessary under the circumstances. In each such case, it is essential that efforts be made to achieve competition and to treat each competitor as fairly as the circumstances will permit."

We agree with USFS that the FBI's decision to disregard the results of the CBD synopsis and, instead, to substitute a sole-source award to Itel, was improper. The FBI spent approximately two months considering its decision -- ample time to have completed the expedited procurement procedure it began with its CBD announcement and to have made award to a firm other than Itel if appropriate. Moreover, by disregarding the results of the CBD announcement, the FBI made an award at a substantially higher price than Itel's competitors offered. FPR § 1-4.1107-6(a), set out earlier, requires that award in procurements where an FSS contract is used as a basis for comparison be based on lowest cost, price and other factors considered.

In reaching our conclusion, we recognize that the FBI also argues that USFS's offer was not responsive to its needs in any event because USFS responded to the CBD announcement of the FBI's intent to lease 16 Itel drives by proposing lease to ownership and purchase plans which at the time exceeded the FBI's known needs. However, we note that the FBI did not reject USFS's proposals for this reason. Moreover, the FBI never issued a solicitation document (e.g., an RFQ) or otherwise limited proposals to offers to lease equipment. Thus, the FBI never established a foundation on which it could have rejected USFS's offers on this basis.

Finally, we note that the FBI argues that USFS is not an interested party entitled to protest this issue because it did not submit the lower of the two non-schedule offers received.

However, both USFS and the other non-schedule responder offered lower prices than Itel's FSS price. As the GSA memorandum quoted above indicates, the firms should have been asked whether they would agree to substantially similar terms to those contained in the Itel FSS contract and to submit firm prices. There is no reason why either firm could not have lowered its price in response to such a request. Accordingly, the FBI's belief that USFS would not have been in line for award was premature.

- III -

USFS' third complaint is that additional quantities of drives were improperly ordered from Memorex under GSA contract GS-00C-50376. Award of this contract on February 22, 1980 was the result of GSA's effort to procure a follow-on contract to replace the original Itel mandatory requirements contract (GS-00C-50022) discussed above. According to USFS, the 8 single density and 48 double density disk drives ordered should have been treated as an "upgrading" of the FBI's system, and thus should have been considered as falling outside the scope of the mandatory portion of the Memorex contract which does not apply, according to its terms, "in an upgrading situation, unless the overall economics are in favor of [its] use * * *." In this respect, what is meant by an upgrading situation is not defined.

The record shows that in purchasing the drives from Memorex the FBI relied on oral advice from a GSA ADTS contracting officer that the "upgrading" exception in the contract refers to a situation such as where an agency is converting from single density disk drives to double density ones, and not where an agency is simply adding disk drives to those that it already has. This usage is consistent with the common meaning of the term "upgrade," which is defined as the process of enhancing the usefulness or value of existing equipment. Webster's New Collegiate Dictionary (1975). The FBI ordered from the Memorex contract because it was only adding tape drives, which based on the GSA advice was not in its view "an upgrading situation."

USFS has proffered no support for its position that the FBI's addition of the drives to its computer operations

constituted "upgrading" other than referring to the dictionary definition of "upgrade," which we believe is consistent with the FBI-GSA view. The protester has the burden to affirmately prove its case. Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 CPD 29. On the instant record, we have no basis on which to question the FBI's determination that the challenged 56 drive quantity is not exempt from Memorex's mandatory contract.

- IV -

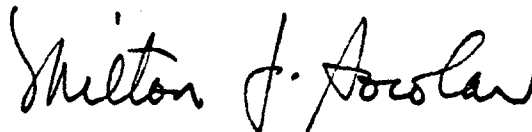
Well after this protest was filed, USFS amended its complaint by alleging that any FBI purchase of new drives from Memorex is not required because this situation comes within 11 additional exceptions to the mandatory provisions of the Memorex contract. USFS has not explained, however, why it believes each of the exceptions is relevant, and indeed, has offered no support for its contention apart from listing contract clauses which it says apply. Section 21.1(c)(3) of our Bid Protest Procedures, 4 C.F.R. part 21 (1981), requires that a protester state its grounds of protest. Since the Memorex contract appears on its face to be a mandatory source of supply for FBI disk system needs, USFS's mere recitation of a list of allegedly relevant contract clauses is not sufficient to define a basis of protest. Accordingly, we will not consider the matter further.

- V -

We have concluded that, because the FBI failed to compete its needs, the agency improperly leased 160 single density drives from Itel under requirements contract GS-00C-50022 and 16 under Itel's FSS contract. The protest is sustained to that extent.

However, the FBI informally advises that the leases have expired; that the agency decided to upgrade its facilities by converting 112 of the drives to double density drives; and that the upgrading has been accomplished by purchasing (with GSA approval) all 176 and converting 112 of the drives leased from Itel after surveying the market and finding that this was the least expensive way to meet its needs. In this regard, the FBI's needs were announced in the CBD and we note that USFS did not respond and did not protest the subsequent purchase from Itel, which also was announced.

Accordingly, no corrective action is available with respect to the improper procurements. By separate letter, we are advising the FBI Director of the noted procurement deficiencies.

A handwritten signature in dark ink, reading "Milton J. Aroslan". The signature is written in a cursive style with a large initial "M".

Acting Comptroller General
of the United States